EXHIBIT 1
DATE 1/14/09
HB 17

Before the House State Administration Committee

January 14, 2009

Testimony of Mark Cadwallader, Dept. of Labor and Industry

House Bill 17

Good morning, Mr. Chairman and members of the Committee. My name is Mark Cadwallader. I am a staff attorney for the Montana Department of Labor and Industry, and have been involved with the administrative rule process in the Department for the last 16 years or so, as a rule writer, as the presiding officer at rules hearings, and as an agency rule reviewer.

I am here in opposition to House Bill 17 because I believe that requiring that every provision of an administrative rule be absolutely or strictly necessary, as opposed to reasonably necessary, will result in making it harder for Montana businesses and citizens to understand what is required of them – what they must do, what they cannot do, and how to go about accessing government services and benefits.

As an example, the Department of Labor and Industry has a number of administrative rules regarding medical services provided in workers' compensation claims. Under certain circumstances, doctors are required to obtain prior authorization from the insurer in order to perform certain specified procedures. The administrative rule explains how medical providers can request prior approval, and how insurers can respond, and what happens under certain circumstances when the insurer does not respond. The explanation of the process of making a written request at least 14 days in advance, and if the insurer does not respond within 14 days, the procedure is deemed to be authorized, may not meet the standard of being strictly "necessary", even though it is very helpful to providers, insurers, and injured workers. Listing the specific procedures requiring prior authorization might not even be strictly "necessary", because the statute only requires that an insurer provide "reasonable" primary

medical services to an injured worker. Because some of the Department's customers asked for rules to help explain what constitutes reasonable primary medical services, the Department undertook rulemaking. Insurers, providers and injured workers can look to the Department's administrative rules for clarification of what is "reasonable primary medical services", rather than always having to resort to litigation to sort out what is "reasonable" in commonly occurring situations. While those administrative rules help make the workers' compensation system run more smoothly, I cannot state that they are absolutely necessary. I believe, and I think that many participants in the worker's compensation system will agree, that it is reasonably necessary to have those rules.

Striking the modifier "reasonably" and "reasonable" from the phrases "reasonably necessary" and "reasonable necessity" will make it harder for agencies to respond to the needs of their customers and the public by clarifying statutory procedures and explaining statutory phrases. I believe that the Department of Labor and Industry's administrative rules help the public understand what rights and obligations they have, and help make it easier to work through an administrative process established to implement the statutory provisions enacted by the Legislature. Injecting a standard for strict or absolute necessity for a rule will ultimately, in my opinion, make it harder and more costly for Montanans to follow the laws of the state.

I want to provide some background information on when and why an agency such as the Department of Labor and Industry might promulgate an interpretive rule using implied rulemaking authority.

From time to time, the Department is asked by its external customers (businesses and workers in Montana) to provide guidance on issues relating to some sophisticated legal topics on labor law matters. Often, it is employers that want to get agency direction on how to approach certain matters related to the

employer-employee relationship. When those matters come up frequently enough, we sometimes propose official "advisory only" rules to articulate the broad considerations that an employer needs to take into consideration when making certain business decisions.

One good example is the concept of the "BFOQ" - the bona fide occupational qualification - which is a recognized exception to Montana's laws prohibiting discrimination under Title 49, MCA. Section 49-2-303 (1), MCA, prohibits discrimination on the basis of various protected classes in employment for both the public and private sector, unless there is a reasonable demand for the discrimination based upon the specific job duties. Subsection (3) provides that exceptions to the general prohibition on class-based discrimination that arise from a bona fide occupational qualification be strictly construed.

The question of when a proposed restriction is a bona fide occupational qualification obviously requires a fact-intensive analysis. However, there are some general guidelines and considerations that are broadly applicable in analyzing whether a given restriction is or is not a BFOQ. The Department could draft language to articulate those considerations and guidelines; it would probably be useful for an employer that wants to look at the rules on unlawful discrimination to see that language in order to help the employer understand the concept of BFOQs. Such a rule obviously would be of an advisory nature only; it obviously could not take into account all of the possible variations in situations and fact patterns that might arise in Montana. The rule wouldn't be a laundry list of what an employer could not lawfully do, nor would it be a list of what an employer is required to do, either, but it would be helpful to at least some employers in getting a better understanding of the requirements of law.

Because there is no express statutory requirement directing the Department to specifically adopt a rule about what considerations go in to the BFOQ analysis, the Department's rulemaking authority on the subject has to be inferred or

implied from the general grant of rulemaking provided by 49-2-204(2), MCA. Such an "advisory only" rule is defined as a "substantive rule" by 2-4-102 (13)(b), MCA. The elimination of an agency's ability to adopt an "advisory only" rule means that an agency would not be able to provide as much assistance to the public as is presently available under current law.

Finally, I note that there appears to be typographic error in Section 6 of the bill, regarding the applicability date, which I have previously called to the attention of the Legislative Services Division staffer who drafted the bill. I understand that an amendment has been prepared to correct the date to October 1, 2009.

Please do not limit the ability of agencies to do their jobs and appropriately respond to the needs of their customers. I ask you to either table or give a "do not concur" recommendation on House Bill 17. Thank you.

prepared by:

Mark Cadwallader, staff attorney
Department of Labor and Industry
406.444.0280 (voice) 406.444.1394 (fax) *mcadwallader@mt.gov*

Montana
Department of Labor and Industry
Office of Legal Services

MARK ELLIOT CADWALLADER
Agency Counsel

1327 Lockey
P.O. Box 1728
Helena, MT 59624-1728

Phone: (406) 444-0280
Fax: (406) 444-1394
TTY: (406) 444-0532
Email: mcadwallader@mt.gov